

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JAMES D. SULLIVAN, ET AL

)

VS

)CASE NO: 5:16-CV-125

SAINT-GOBAIN PERFORMANCE PLASTICS

)

) MOTION HEARING

BEFORE: HONORABLE GEOFFREY W. CRAWFORD
DISTRICT JUDGE

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(Appearances continued:)

DATE: October 11, 2016

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1 (The Court opened at 1:30 p.m.)

2 THE CLERK: Your Honor, the matter before the
3 Court is civil number 16-125, James D. Sullivan, et al
4 versus Saint-Gobain Performance Plastics Corporation.
5 Present on behalf of the plaintiffs are Emily Joselson, Gary
6 Davis, Patrick Bernal, John Stasny, Douglas Ruley and David
7 Silver.

8 Present on behalf of the defendant are Mark
9 Cheffo, Patrick Curran and Bradford Fawley. And we are here
10 for a hearing on defendant's motion to dismiss or stay
11 proceedings.

12 THE COURT: All right. Afternoon. Thank you all
13 for coming. Why don't we hear from the defendant.

14 MR. CHEFFO: Thank you, Your Honor. Good morning.
15 Thank you for the opportunity to be here today.

16 I have a few, not many, power points, which I was
17 going to use to aid.

18 THE COURT: Sure.

19 MR. CHEFFO: But before if there's anything
20 specific that Your Honor would like me to address, otherwise
21 I'd be happy to just give a brief presentation.

22 THE COURT: No, I'll probably interrupt you along
23 the way.

24 MR. CHEFFO: That's expected and appreciated.

25 So, Your Honor, I think the crux of plaintiff's

1 argument here is that this, this litigation is somehow
2 separate and distinct from the underlying litigation around
3 some of the regulations that the Vermont regulators have
4 enacted and that it really should not in any way kind of
5 interfere with this litigation. So I think that's a fair
6 characterization.

7 And, you know, and these are, you know, excellent
8 lawyers on the other side. I think that our issue is that's
9 inconsistent with the actual complaint both on its face and
10 really the kind of sum and substance and a fair reading of
11 the complaint.

12 So if we could just go to this next slide. So I'm
13 going to be talking a little bit about what I think the
14 complaint says and why I think there's an overlap. And then
15 also Your Honor I'm sure has had a chance to at least review
16 our papers.

17 You know, why both agency and primary
18 jurisdiction, I think they are used interchangeably or
19 Burford Abstention. And Your Honor these can be persnickety
20 rules. I think in this case the kind of general arguments
21 and themes that we apply to both as I think we'll talk
22 about. So I don't know that Your Honor needs to or we need
23 to necessarily parse each one, though I'm happy to talk
24 about that. And I think as Your Honor knows these are
25 doctrines that are not to be applied in a kind of mechanical

1 way. I think they are up to the discretion of the Court.

2 And I would say to begin before we get into the
3 substance Your Honor we fully recognize that this is a
4 discretionary doctrine, right. So, you know, I think the
5 plaintiffs may have said that our argument is that you must
6 do X. or you must do Y. That's not it at all. Nor are we
7 suggesting at this point that the plaintiffs lack
8 jurisdiction here.

9 I think our arguments are both for efficiencies
10 and for inconsistent judgments and some of the other things
11 we'll talk about that it makes sense to at least consider a
12 stay. And I think I would also highlight that because this
13 is such a discretionary doctrine, and I know in one of your
14 orders Your Honor referenced a concern at least, the way I
15 took it, of the time factor, you know, that this could take
16 two years or so for it to play down, play itself out.

17 And I would urge the Court to at least be
18 openminded in the sense that because this is a discretionary
19 doctrine, and because Your Honor can look at this
20 throughout, that it doesn't have to be an all or nothing.
21 In other words, were Your Honor to be inclined to adopt some
22 of our arguments or all of them you could essentially say,
23 okay, I'm going to do this for three months and then I want
24 to have a scheduling conference and then come back. And
25 we'll talk about how that might apply. So --

1 THE COURT: Let me --

2 MR. CHEFFO: Yes.

3 THE COURT: -- as I see the timeline playing out,
4 I appreciate the fact that you've had to play catch up, you
5 know, with the interim rule and the first emergency rule and
6 the second emergency rule. And it sounds as if shortly the
7 final rule issue, and really that will be the focus of your
8 litigation, assuming that it is used in the form of the
9 first three versions, right?

10 MR. CHEFFO: I think that's fair.

11 THE COURT: So that must be some weeks or months
12 away. It's, at that point the Superior Court lawsuit is
13 filed, the fourth one challenging the final rule. We'd have
14 to allow that a year. And then an appeal, I don't want to
15 be unkind, but a year would be short. So really this, from
16 your perspective, everything would have to come to a halt
17 for at least two years and three would not be inconceivable.
18 So how would I look in the middle of that and say, well, the
19 motion is filed, but we don't have a ruling, it's been too
20 long, I'm too impatient, we need to go. Or the trial courts
21 ruled and I'm too impatient, we need to go, we can't wait
22 for an appeal.

23 Once I take your position then I think I'm locked
24 into the full period of waiting. I can't see a responsible
25 way for leaving the party halfway through.

1 MR. CHEFFO: Well, let me see if I can hopefully
2 address that, Your Honor. I think that, you know, obviously
3 I want to talk about how our -- these doctrines apply
4 completely to the case. But, you know, again, because it's
5 discretionary and because we can look at this a few
6 different ways I think it would be disingenuous, and I
7 certainly wouldn't suggest it, to say that this doctrine I
8 think has probably the strongest applicability for the
9 injunctive claims, right.

10 So, in other words, the plaintiffs, and it's not
11 totally clear, but I think if you look at the last page of
12 their complaint or the second to the last what they are
13 seeking are, you know, new water hookups and medical
14 monitoring.

15 THE COURT: Right.

16 MR. CHEFFO: So as to that, those are things that
17 are literally going on today. I mean, there is -- all you
18 need to do is read the newspaper, is there's discussions
19 between Saint-Gobain and the state about whether there will
20 be water hookups, how that's going to work, you know, what
21 the appropriate levels are going to be. Whether POET's,
22 these point-of-entry systems are appropriate or not, right.

23 So these are things literally that there's boots
24 on the ground, folks, people's expertise who do this for a
25 living are working on it.

1 The same with medical monitoring and blood
2 testing, right. So that's all going to happen if it happens
3 through an infrastructure of the public health system and
4 the good folks in this state would work hard, you know, on
5 those issues.

6 So I would say if you were to look at those issues
7 separately you could easily see a situation where, you know,
8 you are going to know, is there going to be, you know, PEOT
9 Systems, are there going to be hookups, are there going to
10 be X. are there going to be Y. And that could be a three or
11 four month at least, you know, I would suggest if we came
12 back in three months on those we'd all have some learning as
13 to those issues.

14 And the same would be, you know, for some of the
15 medical monitoring claims. Though, candidly, I think that
16 could be longer, right, to the extent there's infrastructure
17 in place.

18 So I would agree with you that if we were totally
19 looking only at the 20 limit and were the state to come and
20 kind of make that a primary rule, then I think that there
21 could be a longer timeframe.

22 But here's also another suggestion, right. The
23 plaintiffs have basically said we reference those, those
24 standards, but we're really not relying on them, at least as
25 I kind of understand their position. Well, one option too,

1 if that's true, I don't think that's a fair reading, so I
2 think we have one of the screens here from their complaint.
3 So there's really two issues I think we have, right.

4 The main issue is that it's kind of pervasive
5 throughout their complaint that they talk about this level
6 of 20. It could have been something else, but it clearly is
7 the 20. What I think the more instructive factor is this,
8 they say that it's, and we're talking about the class
9 definition, right, folks who have interest in real property
10 within the zone of contamination. So, you know, you kind of
11 scratch your head, what is that. It's not within a mile,
12 it's not within X., it's not people who have only 20, in
13 fact, they say it could be 20, it could be somebody else,
14 it's unclear exactly what that class would be. But we then
15 say, because they define it, the zone of contamination,
16 those areas most recently designated by the State of Vermont
17 as designated areas of concern.

18 All right. So what they are saying is on the one
19 hand this litigation has nothing to do with the underlying
20 activities of the state, but yet if you were to determine or
21 I was to determine reading the complaint whose in this case
22 potentially and whose not in terms of a class, the only way
23 we would know it is to look at what the state is doing in
24 this designated area of concern.

25 And then they also say in paragraph 74 of their

1 complaint, and by the way, that could change. It could be
2 more, it could be less, right. So we're not here today to
3 argue whether, in fact, these are class cert. allegations,
4 whether Your Honor should strike them, whether we should
5 move to strike them, whether they could actually be, but I
6 think for purposes of today, at least as this is written,
7 you know, the plaintiffs, again, these are excellent
8 lawyers, and this is an area that they know well and they
9 practice in, but they decided to craft this complaint,
10 right. They could have done it any number of ways.

11 What they did was essentially incorporate and
12 tether their entire class definition, their putative class
13 definition to an underlying state court regulatory process.

14 And this was where I think under primary
15 jurisdiction and the Abstention Doctrine, you know, if you
16 look at the factors, I mean, I think we have strong
17 arguments on the 20 factor, but I think Your Honor doesn't
18 even need to reach that. I think when you look at this
19 designated area of concern, right, whose more in a better
20 position to determine what that means, right. I think this
21 is their document. But, you know, may I?

22 THE COURT: Sure. Of course.

23 MR. CHEFFO: Thank you. I'll try to keep my voice
24 up. You know, this is at least one of the maps of the
25 designated area of concern, right. This is what the

1 regulators have talked about.

2 Now, presumably, because it's not just throwing a
3 dart board, whether I agree with this or not, they probably
4 looked at the 20 factor, right. So that plays in. And
5 let's say it was 18 or 100 or 70, I have to assume that this
6 would change in some way or could change, right. And it's
7 also not just based on a specific number, but this is, I
8 have to assume, though I can only tell Your Honor I don't
9 have specific knowledge of it, but there's modeling issues,
10 there's concerns, there's geography. There may be air
11 deposition issues, water deposition issues, hydrology.

12 I mean, these are things that certainly Your Honor
13 could read and understand and address if you determined to
14 do that. And we'd have experts that would deal with it.
15 But in the first instance the plaintiffs have basically said
16 we want to be just like them, right. And that's very
17 complicated constellation of factors are what the regulatory
18 agency has put together and done. And then, you know, to
19 argue that we have nothing to do with that, and Your Honor
20 shouldn't be guided by what the regulators are doing when
21 their entire litigation scheme is based on it, I think, you
22 know, is a problem that is not of Saint-Gobain's creation.

23 So I think there are a few issues. One is, I
24 think Your Honor could divorce very easily the injunctive
25 type claims and the medical monitoring. I also think that,

1 and we'll hear what, you know, my kind of learned colleagues
2 will say, and hopefully I will have a chance to respond.
3 But if they tell us this was inartfully plead then perhaps
4 they should replead their complaint, redefine their, their
5 putative class so we could then better understand exactly
6 what they are talking about and whether there is an issue
7 here of primary jurisdiction.

8 But our position I think, and I think the case law
9 supports it, I think their own allegations support it, is
10 that based on what they have plead this is a situation where
11 Your Honor would be getting literally in the middle of what
12 the regulators are doing, how they've come to their
13 determinations, whether it's reasonable, exactly at a time
14 when under particularly Burford, which I think focuses more
15 on whether there's litigation that may be addressing some of
16 these things, I mean Your Honor would essentially have, we'd
17 have coordinate litigations, potentially inconsistent
18 rulings.

19 And, again, I would just say that while the time
20 factor may be something of concern to Your Honor, and I get
21 that, this is something that is only though really created
22 as a result of the way the plaintiffs have plead this
23 litigation.

24 THE COURT: So what, if they had said 70, which I
25 understand is the E.P.A., some kind of E.P.A. limit, maybe

1 not their last word, but a number that the E.P.A. has put
2 out, then all this, this motion would drop off the table and
3 you would just say, fine, we'll deal with 70, we'll hear
4 from the experts?

5 MR. CHEFFO: Well, a quick answer, I'm not sure we
6 would, you know, we may have other challenges to it, but I'm
7 not sure that if they just said 70. So I think there is two
8 components, right. It's not just the number, though I think
9 that is a factor. I think our argument would be much harder
10 if it was just the number, frankly, because they would
11 argue, well, you know, the fact that we happened to pick the
12 same number as the regulators that doesn't mean that it
13 could be potentially inconsistent and I think you'd have a
14 pathway.

15 So quite honestly, Your Honor, I'm not sure we
16 would have made this motion if it was just 20 or 70. I
17 think the core issue here is who they've defined, right. So
18 they basically told us, again, putting aside the fact that
19 it's almost like a failsafe class, it's people who are in --
20 as I understand it, what they are saying is the 20 is not
21 really a factor, and I'm not sure how that can be, but it's
22 20, or more or less, if you're trying to look at whose in
23 this class, right. And then it's people in this zone of or
24 the designated area of concern. And we know that by looking
25 at what the regulators have determined. And they say that

1 may change or it may not.

2 So I'm not sure how you could have a class
3 definition that, you know, it's kind of a moving target.
4 But what I would say is that's why I think, frankly, the
5 Abstention Doctrine and the primary jurisdiction or agency
6 arguments there applicable because it's kind of a double
7 shot that you have the number but you also have a definition
8 that is exactly overlaid on top of what the regulatory
9 agency is doing. And that's something that is unusual.

10 THE COURT: All right. And I wasn't sure what the
11 nature of your challenge in the Superior Court was to, to
12 the agency regs. Some of it I saw related to lack of notice
13 and rule making deficiencies. Presumably those will be
14 cured by the time you get to final rule.

15 MR. CHEFFO: That's correct.

16 THE COURT: So what is the rest of it?

17 MR. CHEFFO: Sure, Your Honor. And I think, you
18 know, Mr. Fawley is also here with me today is actually very
19 much involved in that. But the sum and substance is, you
20 know, I think you saw in our papers, there was an emergency
21 rule, right. There was no -- there was an interim rule and
22 an emergency rule.

23 THE COURT: Right.

24 MR. CHEFFO: And I think the bottom line is that
25 based on, you know, what the federal regs., it's really a

1 challenge to the process. There was no ability to see what
2 the record was. There was no ability to have public
3 comment. There was no, in our view, kind of basis for, for
4 that number of 20.

5 So it's basically a challenge to determine what
6 the -- whether the agency and the record upon which they
7 relied in order to come to the 20 was, in fact, something
8 that was supportable and supported based on both the science
9 and the underlying studies and whatever else.

10 But right now, from our perspective at least, and,
11 again, we, these folks are, you know, operating in good
12 faith. And they have a job to do. And we have no issue
13 with public health authorities. The issue really here is
14 that all of a sudden we had this kind of 20 number, which
15 seemed somewhat arbitrary at the time, and now we know that
16 even the federal government has come out with a 70 number,
17 but backed up on a record and showed at least what they
18 have -- the reasons why at least they believe 70 is
19 appropriate.

20 So that's really the sum and substance. It's a
21 kind of a challenge to the process and the lack of a record
22 and essentially accountability and accessibility of that
23 record.

24 THE COURT: So how much of that would drop away
25 with respect to the final rule? Because presumably, I

1 understand about emergencies, I understand about interim
2 measures, we all read in the press about the, you know,
3 public concern and political concern and regulatory concern
4 that may lead to rapid decision making, but presumably the
5 final rule everybody takes a deep breath, follows the book
6 and does the steps.

7 So what would be your challenge if the process
8 oriented complaints that you didn't have time to come, you
9 didn't know it, you were addressing, whatever it is, when
10 those drop away what's left?

11 MR. CHEFFO: Well, Your Honor, look, I don't want
12 to suggest that it's, because I think we have a good
13 faith -- it's not a fait accompli that we will challenge it,
14 right. I mean, that's a -- I think what we will do, like
15 what you would expect us, and I think the agencies would, is
16 to look at what their final rule is, look at what their
17 record is, look at what they tell us, right, if anything.

18 And then we will make a good faith determination.
19 You know, we may say we still don't have any information, we
20 don't understand it. We may say we fundamentally disagree
21 with this number, but at this point, you know, we believe
22 it's within the discretion and the purview of the agency to
23 do that.

24 So, you know, it's not something we necessarily
25 have determined no matter what they do we're going to

1 challenge it.

2 THE COURT: So when are we, maybe your colleague
3 knows better, but when is it likely that the final rule
4 makes that decision?

5 MR. CHEFFO: I think -- well, here's what I would
6 say is I think that the state has asked us for a 60 day
7 extension on the briefing of the emergency issue. So,
8 again, if I was reading tea leaves I would say that they
9 believe that it will be within the 60 days. Again, that's a
10 little bit of an assumption.

11 THE COURT: Yeah, I see what you mean. They said
12 give us 60 days and events are going to overtake the
13 emergency.

14 MR. CHEFFO: It may mute the underlying
15 litigation. So, again, they can come back to us on day 59
16 and say, you want another 60 days. But I'm making an
17 assumption that they believe that it's -- please.

18 MR. FAWLEY: Brad Fawley, Downs, Rachlin and
19 Martin. We actually have a letter from the attorneys for
20 the state saying that the reason they want the 60 day
21 extension is because events will overtake. And they expect
22 to promulgate their final rule within that time period,
23 therefore, rendering our current appeal of the second
24 emergency rule mute.

25 THE COURT: Right.

1 MR. FAWLEY: And so they won't even have to answer
2 that challenge.

3 THE COURT: All right.

4 MR. FAWLEY: And will move on.

5 THE COURT: And that sounds plausible.

6 MR. FAWLEY: Yes.

7 THE COURT: Okay, thanks.

8 MR. CHEFFO: Your Honor, I had some other slides,
9 but I think, again, unless you have -- I think I've frankly
10 covered most of what I would have said. Our kind of main
11 argument, as I said, is this is an overlap. I think there's
12 a lot of -- it's in our brief as well, a lot of times where
13 they rely on the 20.

14 I think, again, when you apply the primary
15 jurisdiction agency and Burford Abstention Doctrine it's
16 rare that, we fully recognize that, it's not for every case,
17 but we think in this case it absolutely applies.

18 THE COURT: Okay. And I'll give you a chance
19 after we hear from the plaintiffs.

20 MR. CHEFFO: Absolutely. Thank you, Your Honor.

21 THE COURT: Thanks. Miss Joselson?

22 MS. JOSELSON: Good afternoon, Your Honor.

23 THE COURT: Good afternoon. Nice to see you.

24 MS. JOSELSON: I think you've met pretty much
25 everyone at our table. You know David Silver, Gary Davis

1 sitting at counsel table, Patrick Bernal from Rob
2 Woolmington's firm. And you met Doug Ruley.

3 THE COURT: Right.

4 MS. JOSELSON: And in the back we've got Avi
5 Springer who is a new associate with our office from New
6 York, but he had previously clerked for Judge Sessions.

7 THE COURT: Great. Glad to have you back.

8 MR. SPRINGER: Thank you.

9 THE COURT: And also with your, some of your
10 potential class members?

11 MS. JOSELSON: Is Mr. Sullivan here? Yes, we've
12 got Jim Sullivan. Oh, and we do have Leslie Addison. I'm
13 so sorry. They came in while my back was turned.

14 So in essence we believe that the defendant's
15 motion rests on two mischaracterizations, both that the
16 complaint is reliant on the state's PFOA Standard and
17 mischaracterization of the law of abstention.

18 We believe they cite no case that allows
19 abstention in a common law nuisance case such as this
20 alleging property diminution.

21 Simply stated --

22 THE COURT: Can I ask you a question? Only really
23 for my own background and understanding. I went back
24 through the complaint again today with a little more incite
25 than when I first read it, why did you take out people that

1 have suffered personal injuries?

2 MS. JOSELSON: Well, because we expect that
3 personal injury claims won't be suitable for class treatment
4 and they will probably be making separate claims for them.

5 THE COURT: Okay. Thanks.

6 MS. JOSELSON: So we maintain that no part of our
7 complaint relies on the current standard of 20 parts per
8 trillion. And we will not in any point in this litigation
9 be asking this Court to review the propriety of the 20 parts
10 per trillion standard or anything else the state is doing in
11 its regulatory function.

12 We don't rely on the 20 parts per trillion
13 standard in our complaint either to identify those who have
14 been injured or those who are entitled to damages or those
15 who fall within the class.

16 The real gravamen of our complaint is that
17 plaintiffs all own property within this zone of
18 contamination.

19 And if I may, the Court may be aware that
20 initially when the state first became aware of the potential
21 contamination it simply drew a 1.5 mile radius circle around
22 the location of the plant and started testing wells. And
23 sort of like a biopsy in a cancer diagnosis, when you get to
24 the margins and you've got cancer cells on the edges you
25 keep looking. And that's what the Court, the regulatory

1 agency did over time.

2 And so now starting, this process started in
3 March, by the end of August, now we're in October, although
4 this is the most recent state map, we pretty much have, the
5 boundaries haven't changed much over the last three months.
6 We've got, if you start at the circle we've got a little dip
7 here going up to the northwest along the boundary of New
8 York. We've got down a little bit southwest. We can
9 continue around the circle and we go a little further south,
10 all the way along the old factory is here, and the old
11 landfill is here.

12 And then we go straight north. The less old old
13 landfill is here. And then the state has simply gone along
14 the border between North Bennington and Shaftsbury. There
15 are a few hits, as the Court may be able to see, of
16 non-detect, but also above 20 to 100 parts per trillion in
17 this area here.

18 And so the, the boundary may be extended a little
19 bit, but we don't expect either that the standards are going
20 to change or that the map will change as a result of that.

21 And the basis of our complaint in choosing to
22 identify the putative class as within the state identified
23 zone of contamination is that it's been public knowledge now
24 for months, and publicly disseminated information, that the
25 area of concern with regard to PFOA contamination in

1 Bennington and North Bennington is this outline.

2 And everyone who owns property within that
3 outline, whether they have contaminated wells, above or
4 below the 20 parts per trillion, or whether they are on town
5 water, are suddenly owners of property that are contaminated
6 with PFOA and no longer have the same rights and abilities
7 and value of the property, their rights and abilities to use
8 and enjoy their property in the same way they did before
9 they discovered the contamination.

10 So we can go through the complaint paragraph by
11 paragraph if the Court would find that useful. But nowhere
12 in any of the paragraphs that define the causes of action or
13 the claims for damages or the class definition are we
14 reliant in any way on the 20 parts per trillion.

15 Would the Court find that a useful exercise?

16 THE COURT: No. I see, I mean, it's, you're kind
17 of missing each other. You say that, but at the same time
18 your map with the, what I think of as the cat seers poking
19 off and catching a few additional tests, that's determined
20 by the state regulators and their reliance on the 20 parts
21 per trillion measure. So it's kind of, it's kind of brought
22 into your analysis that way. It's, somebody else did the 20
23 parts per trillion.

24 MS. JOSELSON: In the 35 or so years that I have
25 been doing these cases there is always a relationship

1 between a common law nuisance in a property diminution case
2 and the conduct of the regulators. They're parallel
3 processes. And together private lawsuits and public
4 lawsuits or regulatory proceedings work together to enforce
5 environmental protections.

6 And standards frequently change throughout the
7 course of a litigation as the science catches up with the
8 rules. And, frankly, in my experience, I've never had an
9 abstention argument in these cases. I had one preemption
10 that was based on statutory language that went all the way
11 up to the U.S. Supreme Court, but not abstention because
12 when we're seeking to protect private property rights and
13 private property values and the associated rights related to
14 property ownership under Vermont law that really has nothing
15 to do with what the state is doing in its regulatory
16 proceedings, especially in a case like this, where there is
17 no agency within the state or the federal system were they
18 involved charged with protecting private property rights.

19 And there's no part of what the state is doing or
20 intends to do that has anything to do with that. There's
21 no -- there's just simply no overlap between what the state
22 is doing and will continue to do and what we're doing.

23 There are no claims in this case that are outside
24 the normal purview of judge or jury. Common law claims in
25 nuisance, negligence, strict liability, battery, trespass

1 are wholly within the realm of expertise of this Court.

2 And none of the particular experience or expertise
3 charged with regulatory agencies will enter this litigation.
4 There will be expert witnesses, there will be reasonableness
5 arguments, but, you know, in order to prove negligence we
6 have to prove unreasonable conduct. In order to prove
7 nuisance we have to prove unreasonable interference with use
8 and enjoyment of property. In order to prove trespass we
9 simply have to prove the presence of contaminants on
10 people's properties.

11 And as the defense has conceded, there's nothing
12 about the class certification process that needs to be
13 argued at this point. We're way premature for that.

14 And so we believe that the rights of our clients
15 who have already suffered such distress at learning that,
16 for some of them, for the last 30 years they've been
17 drinking and feeding their children water contaminated with
18 PFOA. I mean, that's just so enormously destructive it
19 takes me a while sometimes to remember when I pick up a
20 glass of water at my house that what it would mean to me to
21 know that I raised my children on what I subsequently
22 learned to be contaminated water and the importance of
23 proceeding with discovery and learning how we can prove the
24 claims that we believe are, to a large extent, going to be
25 indisputable. Moving forward with that process will

1 not/interfere in any way with what Saint-Gobain has decided
2 to challenge that the state is doing. Nor is there any
3 possibility of any inconsistent rulings coming from the
4 regulatory agencies or this Court. There just simply isn't.

5 And that -- the fact that the defense can cite no
6 case, we believe, on similar facts, where it's a common law
7 nuisance, negligence, property damage claim in no case has
8 any court found that abstention is proper.

9 It's only where dispositive issues are already
10 being litigated in the agency jurisdiction that, and
11 identical claims are being raised in the federal court case
12 that abstention is proper. So it just, it seems to us to be
13 an argument that is very far from the mark.

14 THE COURT: I guess I would ask the question this
15 way, if at the end of the state regulatory process, which
16 I'm told is in months, not years, the state says we acted in
17 good faith, but under pressure, and we really think, in
18 looking at the science, that 70 parts per trillion, the
19 E.P.A. measure, that is the tipping point for concern, then
20 how does your case change?

21 MS. JOSELSON: Not a whit. Not at all.

22 THE COURT: You still say that --

23 MS. JOSELSON: We still say that our properties
24 are within the area, which happens to be most adjacent to
25 the sources of PFOA contamination, within which there is

1 PFOA contamination and, therefore, that, among other things,
2 a willing buyer is not likely to be willing to pay fair
3 market value for that property as it would if the same
4 property were somewhere distant in Bennington, somewhere
5 else away from the PFOA contamination.

6 These maps have been in the news, they've been at
7 regular almost monthly public meetings. Everyone knows and,
8 in fact, anecdotally people are constantly asking when they
9 are looking at properties in Bennington and North
10 Bennington, well, where is it. Is it within the zone of
11 contamination? Thanks, but no thanks. Or maybe speculators
12 will say --

13 THE COURT: So sort of a stigma problem?

14 MS. JOSELSON: It is. And Vermont law fortunately
15 recognizes stigma damages in cases like this.

16 THE COURT: All right. Thank you. That's
17 helpful.

18 MS. JOSELSON: You know, again, there are numerous
19 cases that we believe are wholly distinguishable that
20 they've cited, but more importantly, there are at least
21 three cases which we think are most similar to ours. And
22 the courts have refused to find abstention. In the Martin
23 case in Connecticut, Martin versus Shell, the Court holds
24 that, the Federal District Court holds that there should be
25 no primary jurisdiction abstention because the state

1 standards aren't dispositive of the common law claims. In
2 trespass there's no limit to the amount of toxin that --

3 THE COURT: Right.

4 MS. JOSELSON: -- justifies the claim. And
5 there's no administrative agency with jurisdiction
6 protecting private property rights. On all fours with ours.

7 The same with Town of New Windsor versus Avery
8 Dennison in the Southern District of New York, the federal
9 trial court holds no primary jurisdiction abstention because
10 agency expertise isn't necessary to adjudicate these common
11 law claims. The agency couldn't award damages of the sort
12 that the plaintiffs are seeking. Though the agency's
13 findings may be relevant factually to the plaintiff's claims
14 they are not dispositive in any way. And also recognizes
15 the tendency of agency proceedings to take a long time. And
16 justice delayed is justice denied especially with people who
17 are so freaked out, and justifiably so, about this pretty
18 horrendous contamination of their properties. And having to
19 explain to them why we haven't yet been able to even get an
20 answer to our complaint let alone commence discovery is
21 difficult.

22 THE COURT: So what will happen, if the motion is
23 denied what will be your, what, would you move immediately
24 to the certification issue or --

25 MS. JOSELSON: No, no, no.

1 THE COURT: -- do you look for a period of
2 discovery, to see if you can lay out what, in months what
3 you see coming from your perspective?

4 MS. JOSELSON: Yeah. So the first thing we'd like
5 to do, and as this Court knows we have tried to do that, is
6 set out a reasonable discovery schedule. And let's learn
7 what issues, you know, what evidence there is, what
8 documents can be produced, what issues are in dispute and
9 what issues aren't.

10 We expect that there will likely be requests to
11 find because we think a lot of issues will not be disputed.
12 We'll be identifying experts. They'll be probably -- I'm
13 sure this isn't the first motion to dismiss that we'll see.

14 THE COURT: Right.

15 MS. JOSELSON: But discovery is the first goal.
16 And so any, yeah, that's what we hope to do first. And only
17 at the end of that will it be reasonable to either redefine
18 class or simply move for class certification or, you know,
19 not --

20 THE COURT: So from your perspective it's
21 discovery first and certification second?

22 MS. JOSELSON: Absolutely.

23 THE COURT: After like a six or 12 month period?

24 MS. JOSELSON: Yes.

25 THE COURT: All right. Thank you. Because that

1 buys time, there wouldn't be need for a court ruling on any
2 significant issue, I mean, maybe a discovery fuss, but other
3 than that, until well after the regulators have run their --
4 have issued their final ruling?

5 MS. JOSELSON: Exactly. Exactly.

6 And, as I said, the standard could be anything.
7 And it doesn't affect our case because our plaintiffs are
8 already holding property within the zone of contamination.
9 And reasonably that's where the contamination is. And, you
10 know, we are concerned regardless of whether it's one part
11 per trillion or over a thousand parts per trillion with good
12 reason because our plaintiffs are already, as the state's
13 acknowledged, are already experiencing levels of PFOA in
14 their blood that are well, well, well above the national
15 average.

16 So I think it's important that none of the cases
17 that the defense has cited are anywhere near a common law
18 claim where there is any abstention order granted. They
19 simply don't exist for these very good reasons.

20 And really, you know, the same arguments go for
21 Burford Abstention. This case does not, you know, the
22 standard, does the case present difficult questions of state
23 law bearing on policy problems of substantial public
24 importance whose importance transcends the result in the
25 case then at bar.

1 Clearly it, the state is doing important work.
2 But the importance of this case and the ability of these
3 plaintiffs to seek relief in this Court, which clearly has
4 proper jurisdiction, doesn't warrant the very extraordinary
5 relief of this Court declining that proper jurisdiction. As
6 this Court said in Vereline even if there were an analogous
7 proceeding in state court, which there is not, even if, you
8 know, it just is not an abstention situation.

9 THE COURT: All right. Thank you.

10 MS. JOSELSON: Thank you.

11 MR. DAVIS: Your Honor, may I clarify one thing?

12 THE COURT: Of course.

13 MR. DAVIS: Gary Davis for plaintiffs. When Miss
14 Joselson was talking about the map and how the map was drawn
15 by the state --

16 THE COURT: Right.

17 MR. DAVIS: -- Your Honor asked a question about
18 that, was it drawn with regard to the 20 part per trillion
19 standard that the state has set. And the answer is no. The
20 answer is it was drawn to find the contaminates where ever
21 they may be. And the area of concern has been expanding
22 based upon the finding of more wells that were contaminated
23 beyond the original one and a half mile circle.

24 So the 20 parts per trillion is the rule that they
25 are challenging. And it's the state standard for what's

1 acceptable for drinking water, but that in no way determined
2 how the state drew this map and where they are sampling to
3 try to find areas of the contamination they can.

4 THE COURT: You mean including wells that tested
5 below 20?

6 MR. DAVIS: That's true, Your Honor. The blue
7 dots are the ones where it was non-detect. And then the
8 yellow dots are between detect and 20. And then orange is
9 20 to 100 and then above.

10 So what you see on that is the state's efforts to
11 determine the scope of the contamination, not just with
12 regard to 20 parts per trillion. I hope that clarifies
13 that.

14 THE COURT: No, that does. Thank you.

15 MR. DAVIS: And just one thing that was
16 interesting in the defendant's presentation is that they
17 conceded that they may not be interested in challenging the
18 final rule. And that, you know, means that the potential
19 overlap or conflict is purely speculative at this point,
20 Your Honor.

21 And I would bet, however, that if the state does
22 end up adopting the 20 parts per trillion as a final rule
23 that we're still going to have an argument in this courtroom
24 over whether the amount of contaminates in people's wells
25 present a risk.

1 They are going to bring in, no matter what the
2 standard is they are going to bring in their experts and
3 we're going to have our experts to argue about whether it's
4 a risk to people to drink this water. And so that's really
5 the question that this Court's going to deal with in the
6 end.

7 THE COURT: Oh, regardless of where the regulator
8 puts --

9 MR. DAVIS: That's right, Your Honor. Unless they
10 concede that whatever the state adopts that they'll come in
11 and they won't argue with, but I doubt that's the case.

12 THE COURT: All right. And on your side you have
13 people lined up that, experts that believe that 20 parts per
14 trillion presents a health risk?

15 MR. DAVIS: There are experts who believe that
16 less than 20 parts per trillion presents a health risk,
17 including the state of New Jersey who has proposed 14 parts
18 per trillion, Your Honor.

19 THE COURT: Okay.

20 MR. DAVIS: Thank you.

21 MR. CHEFFO: Thank you, Your Honor. If I could
22 just address a few quick points. Just in, I think Your
23 Honor asked this question, you know, we've heard about, you
24 know, kind of health risks and everything else, but we've
25 also heard this has, at least as I understand it, nothing to

1 do with personal injury.

2 THE COURT: This is sort of a slam run title kind
3 of a case?

4 MR. CHEFFO: Yeah. Right. I mean, if they -- so,
5 again, I'm not minimizing that, but this idea of the
6 drinking the water and the health risk it's not what this
7 case is about.

8 THE COURT: Right. I didn't appreciate that until
9 this morning when I went back and read it again.

10 MR. CHEFFO: Right. And there are no personal
11 injury cases that are at least filed in this state that I'm
12 aware of.

13 THE COURT: Right. Right.

14 MR. CHEFFO: So where I think there is a
15 disconnect is that, and I think Your Honor asked this
16 question, is that, you know, the plaintiffs haven't really
17 addressed this zone of contamination concern. You know, and
18 again on the one hand they say, well, you know, we have
19 nothing to do with the state, but that map is not created by
20 the plaintiffs or their experts or they went out and hired
21 somebody. I mean, that's literally off the website of the
22 state, right.

23 And this idea that it has nothing to do with 20
24 and, again, you know, I don't know where that comes from, I
25 have not seen that record, I can't certainly speak to

1 authority that if all of a sudden they came in and they said
2 70 that that wouldn't change, you know, but the reality is
3 it has changed over time.

4 And this is what the plaintiffs say in their own
5 complaint, page 74, under the class action allegations.
6 They say, the zone of contamination in those areas of North
7 Bennington and Bennington, Vermont, most recently designated
8 by the State of Vermont, has designated areas of concern of
9 North Bennington and Bennington on April 26, 2016.

10 As discussed in herein DEC has continued to expand
11 boundaries of the zone of contamination as the extent of the
12 PFOA contamination has continued to expand beyond the
13 original and subsequently revised areas of interest. And,
14 as such, the zone of contamination may continue to expand
15 and require amendment and/or modification as defined.

16 So here's where I think we're a little bit talking
17 past each other. I think Your Honor understands, we are not
18 suggesting that this is an everyday type motion that's made
19 that, in every case. Nor are we suggesting that you can't
20 have coordinate state enforcement and federal court
21 coordination. What I think you don't see in any of these
22 cases is where a plaintiff decides to go to their word
23 processor and put out a complaint and define their class
24 that is absolutely coordinate and rests on the state's
25 action.

1 So in these other cases where there's differences
2 and it's not dependent on it, there are differences, as I
3 think conceded and suggested to you earlier, Your Honor. So
4 that's what's different about this case.

5 So I think at a very minimum, you know, Your Honor
6 suggested something that frankly makes perfect sense. One
7 is, we know within a few months that the state is going to
8 be doing something with the 20. At that time they may or
9 may not issue different regs., different information. They
10 may or may not define this map any differently depending on
11 those regulations. The plaintiffs may or may not decide
12 whether they really want to tether their class to something
13 that could change based on a regulator's decision one day
14 and how Your Honor would determine if that's a class that we
15 even know whose in.

16 So, in other words, you know, even tomorrow if
17 someone said we made a mistake or we want to change this, I
18 mean, in terms of just fundamental fairness to Saint-Gobain
19 in this, you know, we have to understand what the scope of
20 discovery is, whose going to be in, what the potential
21 issues are, right. And it can't really be based on what,
22 you know, a regulator may or may not do that's completely
23 outside the Court's purview.

24 So that's really I think simply our point here is
25 that this case is fundamentally different than many, many

1 others because I'm not aware of cases where someone puts in
2 the state's kind of regulatory scheme as part of their class
3 definition. And that's what the plaintiffs chose to do
4 here, Your Honor.

5 THE COURT: All right. Thank you.

6 MR. CHEFFO: Thank you.

7 THE COURT: Miss Joselson? Sure.

8 MS. JOSELSON: This map is the definition of who
9 is living within and who owns property within the zone of
10 contamination. It is unlikely that that will change. But
11 the discovery on liability issues can productively be
12 ongoing over the next six months or more and we will know if
13 that changes, but --

14 THE COURT: The test results won't change, that's
15 what you're saying?

16 MS. JOSELSON: The test results won't change. The
17 areas of concern won't change.

18 THE COURT: The state's views on who, who is in
19 peril and who isn't? Who is at risk and who isn't?

20 MS. JOSELSON: How much peril, who is in.

21 THE COURT: That, that may evolve?

22 MS. JOSELSON: But nothing about our claims
23 changes because now we have and have for months had the
24 identification of those property owners whose properties are
25 contaminated or next to properties that are contaminated

1 according to the best results available to the public.

2 And the defense has not challenged, as we
3 understand it, the map. In their proceedings against the
4 state they're only challenging the 20 parts per trillion.

5 THE COURT: You mean as scientifically
6 unsupportable?

7 MS. JOSELSON: Apparently.

8 THE COURT: Right.

9 MS. JOSELSON: But we know that whether it's 20,
10 70, or even a hundred, that doesn't impact our common law
11 claims. Our common law claims are based on the fact that we
12 now own property that is contaminated to a greater extent or
13 a lesser extent. And, you know, some people may have
14 different concerns based on how contaminated their wells are
15 and how long they've been living there and how long they've
16 been drinking water, how high their blood levels are, but
17 nuisance law does include, as this Court is well aware, the
18 upset and annoyance and inconvenience and distress
19 associated with living with a nuisance.

20 And so while we are not making personal injury
21 claims in this lawsuit the human damages, as opposed to the
22 property damages, are clearly part of this lawsuit. And
23 none of that changes based on whether the state maintains
24 the 20 parts per trillion or changes it higher or lower.

25 THE COURT: All right. Thank you. That was

1 really helpful both of you. Thank you very much.

2 I'll get something out as quickly as I can.

3 Probably about a month. Thanks.

4 (The Court recessed at 2:15 p.m.)

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C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for the United States District Court, for the District of Vermont, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

A handwritten signature in cursive script that reads "Anne Marie Henry". The signature is written in black ink and is positioned above a horizontal line.

Anne Marie Henry, RPR
Official Court Reporter